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No. 373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ROY R. TORCASO, *Appellant*,

v.

CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Maryland, *Appellee*.

On Appeal from the Court of Appeals of Maryland

BRIEF FOR APPELLANT

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CLAYTON K. WATKINS, Clerk of the Circuit Court for Montgomery County, Maryland, *Appellee*.

On Appeal from the Court of Appeals of Maryland

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Maryland (R. 12-19) is reported at 223 Md. 49, 162 A. 2d 438. The opinion of the Circuit Court for Montgomery County, Maryland (R. 7-10) has not been reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on June 30, 1960 (R. 12). An amended notice of appeal therefrom was filed on August 16, 1960 (R. 21). The jurisdictional statement was filed on August 31, 1960, and probable jurisdiction was noted on November 7, 1960,

The jurisdiction of the Supreme Court to review the judgment of the Court of Appeals of Maryland rests upon 28 U.S.C. Sec. 1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

Article 37 of the Declaration of Rights of the Maryland Constitution, the validity of which is here drawn into question, provides as follows:

> "That no religious test ought ever be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

This Article of the Maryland Constitution is challenged as violating the following provisions of the United States Constitution:

FIRST AMENDMENT

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

FOURTEENTH AMENDMENT

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARTICLE VI, (Clause three)

> "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any office or public Trust under the United States."

QUESTIONS PRESENTED

Is that portion of Article 37, Declaration of Rights, Maryland Constitution which, as interpreted by the Maryland Court of Appeals, requires a "declaration of belief in the existence of God" as a "religious test" for an "office of profit or trust", in conflict with the Constitution of the United States, specifically:

1. The ban in the First Amendment, made applicable to the states by the Fourteenth Amendment, on laws respecting an establishment of religion?

2. The provision in the First Amendment, made applicable to the states by the Fourteenth Amendment, protecting the free exercise of religion?

3. The due process and equal protection clauses of the Fourteenth Amendment?

4. The ban on religious tests in Article VI?

STATEMENT OF THE CASE

The undisputed facts of this case, as set forth in the Petition, (R. 1-5), to which Appellee demurred, (R. 6-7), are as follows:

Appellant, a citizen of the United States of America and resident of Montgomery County, State of Maryland, made a proper application for a commission as a Notary Public in and for Montgomery County, State of Maryland. The application was properly endorsed by the Honorable Edward S. Northrop, State Senator for Montgomery County, and forwarded by him to the Governor of the State. On or about the 22nd of June, 1959, the Governor appointed Appellant a Notary Public in and for Montgomery County, State of Maryland.

In accordance with instructions received from the Office of the Secretary of State of Maryland, Appellant went to the office of the Clerk of the Circuit Court for Montgomery

County, Appellee herein, to obtain his commission and qualify for office. At that time, Appellant was requested to take and subscribe to the following oath and declaration:

"State of Maryland, Montgomery County ss:

In the presence of Almighty God, I, Roy R. Torcaso, do solemnly promise and declare that I will support the Constitution of the United States; and that I will be faithful and bear true allegiance to the State of Maryland, and support the Constitution and Laws thereof; and that I will, to the best of my skill and judgment, diligently and faithfully without partiality or prejudice execute the office of

Notary Public of
The State of Maryland
in and for
Montgomery County

according to the Constitution and Laws of this State.

I, Roy R. Torcaso, do declare that I believe in the existence of God.

_____

Sworn to and subscribed before me, Clerk of the Circuit Court of Montgomery County, at Rockville, Maryland, this_____day of_____AD, 19____.

TEST:

_____Clerk"

Appellant stated that he would not declare his belief in the existence of God. Whereupon, Appellee refused to render the commission to Appellant.

Appellant is, and was at all times, willing to take and subscribe the affirmation for the office of Notary Public as contained in Article I, Section 6 of the Constitution of the State of Maryland (R. 4), which section sets forth the form

of Oath or Affirmation required of every person elected or appointed to any office of profit or trust in Maryland. Said form Oath or Affirmation is devoid of any reference to God, Supreme Being, or religious belief.

Appellant sought relief from Appellee's refusal by Petition for Writ of Mandamus in the Circuit Court for Montgomery County, Maryland (R. 1-5). The Appellee demurred (R. 6-7). The Court granted the demurrer and dismissed the Petition (R. 10) on the ground that Article 37, Declaration of Rights, is " . . . simply a declaration showing qualification for office . . ." (R. 8) and is a " . . . restriction applicable to those who wish to hold a position of profit or trust in this State. This restriction . . . seems most assuredly to be one which may be rightly imposed by a sovereign state in dealing with its own officials." (R. 8.)

Holding that the position of Notary Public is a "privilege", the Court stated "the people of Maryland have imposed a qualification of belief in the existence of God as a condition precedent to the taking of his oath." (R. 9.) It further held that Appellant " . . . can continue his religious position without any interference from Maryland either as to his present private employment or his citizenship, as neither is being interfered with." (R. 10.)

In the Court of Appeals, Appellant urged that Article 37 did not authorize, as a matter of state law, the clerk's refusal to issue the oath, and reiterated his Federal constitutional question. The Court of Appeals affirmed the trial court's decision. Its opinion discussed at considerable length, and rejected, Appellant's non-Federal contention (R. 13-17). It construed Article 37 as requiring an oath declaring a belief in God of every state officer. The Court also held that the statute did not violate the Federal Constitution.

It primarily based its decision on the ground that Appellant " . . . is not compelled to believe or disbelieve, under

threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office". (R. 17.) Propriety for such a requested declaration of belief as contained in Article 37 is found by the Court of Appeals on the asserted grounds that said qualification for office is " . . . not based on such an unreasonable and improper classification as to be discriminatory". (R. 17.)

SUMMARY OF ARGUMENT

I. The Maryland constitutional provision requiring a belief in the existence of God as a condition to holding state office violates the protection of the First Amendment, made applicable to the states by the Fourteenth, guaranteeing the free exercise of religion. That guarantee extends to minority, unpopular and unconventional beliefs, including that of a non-theistic nature. Belief, necessarily including non-belief, is afforded the absolute and unqualified protection of this guarantee. A disqualification based upon religious belief is a direct infringement on religious liberty and long held by this Court as unconstitutional. If Government may validly bar one from office on the basis of non-belief, there is no reason why it may not next require a specific belief as a qualification for the office. It may not do either, for each would infringe upon the inviolate area of freedom of religious belief. *ZORACH* v. *CLAUSON*, 343 U.S. 306, is NOT to the contrary.

II. The Maryland constitutional provision violates the ban in the First Amendment against the establishment of religion. Religious tests have long been the hallmark of religious establishment and were considered particularly offensive by the framers of the Constitution. This provision favors theistic religions over non-theistic religions. Even if that were not so, and if the effect of the provision were

to treat all religions alike, it would violate the duty of neutrality between belief and non-belief.

III. The Maryland constitutional provision constitutes a test oath, specifically prohibited by Article VI of the United States Constitution. It was the intent of the framers of the Constitution to include within this prohibition all offices, state and federal alike, since the test oath was well recognized as both an infringement upon the free exercise of religion and as an aid to the establishment of religion. Any doubt as to the application of this ban to the states was removed with passage of the First and Fourteenth Amendments; freedom of religion in the First Amendment encompasses the prohibition against the repugnant test oath, and the entire protection of religious liberty was extended to the states by the Fourteenth Amendment.

IV. The Maryland constitutional provision denies Appellant due process of law and equal protection of the laws, in violation of the Fourteenth Amendment since it is unresonable and discriminatory. The discrimination against Appellant based solely on his religious beliefs is not validated by classifying the office of Notary Public as a "privilege" rather than a "right." It is the nature of the discrimination rather than the label applied to the position which is determinative. The issue is whether the qualification imposed is reasonable, proper and nondiscriminatory. A qualification barring one from public office based on his religious belief alone is unreasonable, arbitrary and highly discriminatory. Government has not the right even to inquire into the nature of one's beliefs, let alone impose sanctions upon him for entertaining them. This discrimination is not made reasonable by the fact that a Notary Public must administer oaths in the course of his duties. One not holding theistic beliefs is qualified to give evidence in a truthful manner, and virtually all of the several states so recognize.

ARGUMENT

I

ELIGIBILITY FOR A STATE OFFICE CONDITIONED UPON A BELIEF IN THE EXISTENCE OF GOD CONSTITUTES A LAW PROHIBITING THE FREE EXERCISE OF RELIGION IN VIOLATION OF THE FIRST AMENDMENT, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

As authoritatively construed by the Court of Appeals of Maryland, Article 37 of that State's Constitution establishes as a prerequisite for holding public office that the applicant take an oath that he believes in God. Since Article 37 directly attacks appellant's beliefs, which this Court has held are entitled to absolute protection, *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, it is appropriate to consider at the outset Maryland's interference with his right to the free exercise of religion.

A. Freedom for Non-Theistic Belief

> "The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly." *Torcaso* v. *Watkins*, Maryland Court of Appeals decision. (R. 19).

The above-quoted statement by the Court below is a significant premise upon which its decision is grounded. However, it is apparent from the language immediately preceding the quoted sentence that the court is referring to the "historical record" of the State of Maryland, not of the United States.

While the Court of Appeals of Maryland grants that "It is well settled that the provisions of the Federal Constitution are supreme, even over a provision of the State Constitution" (R. 17), that Court chose to ignore the decisions of this Court which establish that the protection of the

religious freedom guarantee of the First Amendment must of necessity "encompass the ungodly". It is clear that its protection extends to minority, unpopular and unconventional beliefs. *Cantwell* v. *Connecticut*, 310 U.S. 296; *United States* v. *Ballard*, 322 U.S. 78; *Terminello* v. *City of Chicago*, 337 U.S. 1; *Near* v. *Minnesota*, 283 U.S. 697; *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624; *Kunz* v. *New York*, 340 U.S. 290.

We submit that the notion that religious freedom does not "encompass the ungodly" (R. 19) is treacherous to the religious liberty of all.

> "Freedom of thought which includes freedom of religious belief is basic in a society of free men, *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and death and of the hereafter, which are rank heresy to followers of the orthodox faiths. *Heresy trials are foreign to our Constitution. Men may believe what they cannot prove.*" (Emphasis added.) *United States* v. *Ballard*, 322 U.S. 78, 86.

It cannot and should not be otherwise. Once the door is opened to an official orthodoxy, even if it is only that of a belief in God, the way is cleared for heresy trials. Then we stumble into the labyrinth of determining which God is being sworn to.

The framers of our Constitution and Bill of Rights were wise beyond their time in not attempting to define religion. It is to be noted that they did not put the name of God, Christ, or the Christian religion into the Constitution, but purposefully and designedly omitted them, not because of any hostility to the Christian religion (to which most adhered), but because of their respect, and faith that theistic religions' inherent merits would survive best without official backing. I Stokes, *Church and State in the United States* (1950) 523, 602-612.

This problem was raised when the Bill of Rights was considered, but a plan to insert the words "Jesus Christ" in the preamble to the bill establishing religious freedom in the United States was rejected by a large majority "in proof that they meant to comprehend within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohammed, the Hindoo, and the Infidel of every denomination." Hubbard, *An American Bible*, quoting letter of Thomas Jefferson, p. 101.

This Court has recognized the fact that atheists are encompassed within the purview of religious freedom.

> "On the other hand, other language of the [First] Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it* from receiving the benefits of public welfare legislation." (Court's own italics.) *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16.

"Atheist" has long been an epithet which contending religious groups have cast upon one another. See Morris R. Cohen, *Atheism* in Encyclopedia of Social Sciences (1948). Are Buddhists, Taoists and believers of other non-theistic religions to be exempt? See 19 Enc. Britt. (14th Ed.) page 111.[1]

The judgment below cannot be sustained by distinguishing between those who believe something and those who believe nothing. The Record does not show the nature of appellant's beliefs, and it would be offensive to put them on trial. We think they are irrelevant. This Court has long held that it is not the function of the Courts to enter this domain. *Watson* v. *Jones*, 13 Wall. 679. See also *Vidal* v.

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[1] The wide range of non-theistic beliefs and religions are discussed in the *Amicus Curiae* brief of the American Ethical Union filed herein.

Girard's Executors, 2 How. 127,198; *Joseph Burstyn Inc.* v. *Wilson*, 343 U.S. 495. In *Fowler* v. *Rhode Island*, 345 U.S. 67, 70, it was held to be

> . . . "no business of courts to decide that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."

Nor is it the business of any other branch of government. The Fathers of the Constitution "fashioned a charter of government which envisaged the widest possible toleration of views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." *United States* v. *Ballard*, 322 U.S. 78, 87.

B. The Absoluteness of the Right of Belief and Non-Belief

There can be no doubt that the religious freedom guaranteed by the First Amendment to the Federal Constitution does not embrace absolute "freedom to act," and that all conduct "remains subject to regulation for the protection of society." *Cantwell* v. *Connecticut, supra*, at 303-304. Concededly, the First Amendment does not preclude proscription of polygamy, breaching the peace, or child labor. *Reynolds* v. *United States*, 98 U.S. 145. *Davis* v. *Beason*, 133 U.S. 333; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568; *Prince* v. *Massachusetts*, 321 U.S. 158.

We may even concede for the purpose of this case that the right to express religious belief may not be absolute and might conceivably be constitutionally subject to restriction under the police power, provided it poses a clear and present danger to an important communal interest. Cf. *Chaplinsky* v. *New Hampshire, supra; Kunz* v. *New York, supra.*

But this case involves neither conduct nor expression; it involves only belief. The oath required of Roy Torcaso makes no reference to conduct or expression. The unconstitutionality of Article 37 is apparent as soon as it is rec-

ognized that its direct impact is on beliefs. If one thing is established by this Court's decisions under the First and Fourteenth Amendments, both in the political and religious area, it is that beliefs are inviolate. As Mr. Justice Roberts said for a unanimous Court in the *Cantwell* case, *supra*, at 303-304:

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

This distinction has been recognized since the first case in which this Court examined the character of religious liberty guaranteed by the Constitution. In *Reynolds* v. *United States*, 98 U.S. 145 it was said at 164, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order", and at 166. "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices." Even earlier, in *Watson* v. *Jones*, 13 Wall. 679, decided without reference to constitutional inhibitions,[2] it was declared as a general principle:

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[2] See *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 114-16, where this passage together with its corollary (renunciation of state power to adjudicate religious controversies in passing on the right to church property) was quoted and approved and the rights proclaimed were held "now . . . to have federal constitutional protection as a part of the free exercise of religion against state interference."

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to the support of no dogma, the establishment of no sect."[3]

C. Disqualification for Public Office as a Restriction on Religious Liberty

"The petitioner is not compelled to believe or disbelieve, under threat of punishment or other compulsion. True, unless he makes the declaration of belief he cannot hold public office in Maryland, but he is not compelled to hold office." *Torcaso* v. *Watkins*, Maryland Court of Appeals decision (R. 17).

A disqualification for public office because of religious belief or non-belief constitutes an impairment of religious liberty and an interference with the free exercise of religion. Historically, along with compulsory taxation for religion, disqualification for public office was, prior to the establishment of our Constitution, the most common means of impairing religious freedom.[4]

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[3] On only one occasion has this Court faltered in its adherence to this principle. In *American Communications Association* v. *Douds*, 339 U.S. 382, and *Osman* v. *Douds*, 339 U.S. 846, the Court was equally divided on the constitutionality of so much of the "non-communist affidavit", 61 Stat. 136, 146, 29 U.S.C. §§ 141, 159(h), as required an officer to swear "that he does not *believe* in, and is not a member of any organization that *believes* in . . . the overthrow of the United States Government by force or by illegal or unconstitutional methods." (Emphasis added) But even the opinion of the Chief Justice which sustained the oath in its entirety acknowledged that "one may not be imprisoned or executed because he holds particular beliefs." *American Communications Association* v. *Douds*, 339 U.S. at 408. It also construed the oath narrowly to avoid constitutional questions inherent in a broader prohibition of beliefs than in the overthrow of government *as presently constituted* by force, etc.

[4] See pages 22-26, infra.

This Court has recognized that disqualification for public office on the ground of religious belief violates the Bill of Rights.

> "Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to Federal office, or that no Federal employee shall attend Mass or take any active part in missionary work." *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100.

The same principle was stated in *In re Summers*, 325 U.S. 568, wherein the Court said at p. 571:

> "... It is said that the action of the Supreme Court of Illinois is contrary to the principles of that portion of the First Amendment which guarantees the free exercise of religion. Of course, under our Constitutional system, men could not be excluded from the practice of law, or indeed from following any other calling, simply because they belong to any of our religious groups, whether Protestant, Catholic, Quaker or Jewish, assuming it conceivable that any state of the Union would draw such a religious line."

Again, at the present Term, in *Shelton* v. *Tucker*, 364 U.S. 479, this Court struck down a statute which interfered with the First Amendment rights of teachers. The Court deemed especially significant the potential impact of the legislation on their continued employment.

The same Bill of Rights that protects the Catholic and Jew from discrimination in the holding of public office or practice of law by reason of their beliefs in the field of religion protects the non-theist. Were it otherwise, we would be compelled to concede the existence of two First Amendments, one for those who believe in God and one for those who do not—obviously no such state of affairs exists and no such concession is necessary. Further emphasis of this concept is found in Mr. Justice Jackson's compelling prediction that "The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power." *Zorach* v. *Clauson*, 343 U.S. 306, 323, 325 (dissenting opinion).

If a State can constitutionally bar from public office those who refuse to profess a belief in God, it can require applicants for public office to define what they mean by "God" and can bar those whose definition does not correspond to that espoused by the public official passing upon the qualifications. The effect would be to declare that "the Civil Magistrate is a competent judge of Religious truth," which is "an arrogant pretension falsified by the contradictory opinions of Rulers in all ages". (Madison's *Memorial and Remonstrance,* set forth as Appendix to the *Everson* case, 330 U.S. 1 at 63, 67).

Jefferson pointed out in the Virginia Bill for Religious Liberty that to entrust a civil officer with the power to pass upon religious beliefs "at once destroys all religious liberty, because he . . . will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own". To assure religious liberty for all, civil government must be adjudged to be without power to pass on religious beliefs, directly or as an incident to determining qualifications for public office.

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
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> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." (Emphasis supplied.) *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 638, 642.

This contention, that since the Appellant has a choice either to maintain his religious beliefs or to accept the post of notary public with the price of giving up his religious beliefs, was effectively answered by the Court in *Speiser* v. *Randall,* 357 U.S. 513, 518, where the Court held that this type of choice did infringe on First Amendment freedoms. There the Court said:

> "It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. See Hannegan v. Esquire, Inc., 327 U.S. 146, 156; cf. State ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U.S. 407, 430-431 (Brandeis, J., dissenting). This Court has similary rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board, American Communications Assoc. v. Douds, 339 U.S. 382, 402, or the opportunity for public employment, Wieman v. Updegraff, 344 U.S. 183. So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."

D. *Zorach* v. *Clauson* Discussed

The Court below did not face the religious guarantees of the First Amendment except for one quotation from *Zorach* v. *Clauson,* 343 U.S. 306.

Its rationale is set forth in the following portions of its decision:

> "In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and invalid. As Mr. Justice Douglas, speaking for a majority of the Court in *Zorach* v. *Clauson*, 343 U.S. 306, 313, said: "We are a religious people whose institutions presuppose a Supreme Being." (R. 18.)
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> "To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissible differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror. The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly." (R. 19.)

Nothing that was said or decided in *Zorach* v. *Clauson*, *supra*, endorses the extreme proposition that atheists are beyond the pale of the First Amendment. It is well to quote in context the passage from the *Zorach* case relied on by the Maryland Court of Appeals:

> "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." 343 U.S. 306 at 313.

Viewed as a whole, this language bespeaks governmental toleration of religious beliefs of every kind, and does not license their repression. Non-theistic beliefs also arise from the spiritual needs of man, as the Amicus brief herein of the American Ethical Union abundantly documents.

Nor does the holding of the *Zorach* case aid Appellee. The Court there found that the record supported no claim of governmental coercion in the operation of the released time plan. 343 U.S. at 311-12. It was emphasized that New York was merely accommodating itself to religion. Id. 314-15. But we have already shown that disqualification from public office constitutes coercion in a constitutional sense. Reversal of the New York plan, it was said, would constitute hostility to religion. Id. at 314-15. But Appellent does not ask that Maryland or this Court prefer "those who believe in no religion over those who do believe." Id. at 314. He merely seeks equal treatment. Yet Maryland would deny him the right to serve in public office, or, as the Court below makes clear, to serve as a juror or witness. (R. 18) Plainly, it is much more than mere accommodation to believers for the state to deprive non-believers of all public trust or responsibility. The court in *Zorach* was careful to state that "Government may not . . . use secular institutions to force one or some religion on any person". Id. at 314. By Article 37, Maryland does just that, unless public office itself is not a "secular institution". Indeed, since the means which the state has adopted is the test, the vice goes deeper. For *Zorach* reaffirms that government may not make a religious observance compulsory. An individual's declaration that he believes in God, though not as elaborate as a church service, is indisputably a "religious observance." Compare *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 633-34.

The very sentence on which the Court below so heavily relied will not support the burden sought to be placed on it.

Surely the proposition that "We are a religious people whose institutions presuppose a Supreme Being" does not imply that the state may impose disabilities on those who do not believe in a Supreme Being. To disavow hostility to religion, Id. at 314-315, is not to approve hostility to the nonreligious (even if it be assumed that belief in a Supreme Being is a necessary element of Religion.) If liberty of dissent means anything, it means this.

Reynolds v. *United States*, 98 U.S. 145 is apposite. The decision there rested in large measure on the central role of monogamy in our social life:

> ". . . Marriage, while from its nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed do we find the principles on which the Government of the People, to a greater or less extent rests." Id. at 165.

In the very next paragraph of the opinion it is expressly avowed that laws "cannot interfere with mere religious belief and opinions." (at 166) This plainly is a recognition that even beliefs which are contrary to the whole fabric of our society are beyond governmental interference.

When some of the unorthodox beliefs and opinions which have been given constitutional protection are recalled, the extravagance of the contention that atheism is unprotected comes into sharp focus. Not only belief in polygamy (*Reynolds* v. *United States, supra*) but advocacy of adultery is protected. (*Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684.) In the area of religion the "I Am" movement was held to be beyond Congressional regulation. *United States* v. *Ballard*, 322 U.S. 78. Not even harsh and offensive assaults on the religious beliefs of others

have been excluded. See, e.g. *Near* v. *Minnesota*, 283 U.S. 697; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Terminello* v. *City of Chicago*, 337 U.S. 1; *Kunz* v. *New York*, 340 U.S. 290. It would be a supreme irony and a grave injustice to deny constitutional protection to the Appellant, who respects the religious views of others, and seeks merely to have the State be neutral with regard to his own. Such neutrality is guaranteed by the First Amendment; *Everson* v. *Board of Education*, 330 U.S. 1, 18. The *Everson* and *McCollum* cases dispel any possible contention that the First Amendment distinguishes between believers and non-believers. Indeed, the plaintiff in *McCollum* was herself an atheist, "as she has every right to be", as Mr. Justice Jackson noted in his concurrence. 333 U.S. 203, 232 at 234, and *Zorach* v. *Clauson* did not purport to overrule these decisions. "We follow the *McCollum* case." 343 U.S. at 315. We submit that *Zorach* confirms our view that Article 37 is unconstitutional. Most assuredly it will not bear the heavy burden which the Court below seeks to impose upon it—the view that freedom of religion extends only to those who believe in a Supreme being.

II

ELIGIBILITY FOR A STATE OFFICE CONDITIONED UPON A BELIEF IN THE EXISTENCE OF GOD CONSTITUTES A LAW RESPECTING AN ESTABLISHMENT OF RELIGION IN VIOLATION OF THE FIRST AMENDMENT, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

A. Religious Tests and Establishment of Religion

The requirement of a belief in God as a qualification for public office in Maryland strikes at the very heart of the First Amendment's prohibition against an establishment of religion. For it creates a religious test for public office—historically the hallmark of religious establishment.

In *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, the Court clearly stated that the "establishment" clause is applicable to the states:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

Later, in *Everson* v. *Board of Education*, 330 U.S. 1, the Court reiterated this position, and expounded further:

> "The 'establishment of religion' clause of the First Amendment means at least this: *Neither a state nor the Federal government can set up a church. Neither* can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither* can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. *Neither a state* nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religions by law was intended to erect 'a wall of separation between church and State'. *Reynolds* v. *United States*, supra at 164." Id. at 15-16. (Emphasis added)

In *McCollum* v. *Board of Education*, 333 U.S. 203, the Court was asked to overrule *Everson*, but expressly and decisively declined to do so. In the later case of *Zorach* v. *Clauson*, 343 U.S. 306, the *McCollum* case was found distinguishable, but the Court carefully declared, "We follow the McCollum case." Id at 315.

It therefore is apparent that this Court has rigorously adhered to the proposition that states are as forbidden by the Fourteenth Amendment as is the Federal government from making any law respecting an establishment of religion.

The religious clause in the First Amendment "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and their posterity." *Everson* v. *Board of Education*, 330 U.S. 1, 8.[5] It is appropriate therefore, to review the place of the test oath in the history of religious establishment.

The Act of Supremacy, 1558, 1 Eliz. 1, c.1., § 19, required of all holders of office in church and state an oath accepting the Queen as supreme governor of all things ecclesiastical and temporal. This oath was extended by the act of 5 Eliz. 1, c.1., § 5 (1562) to teachers, lawyers, officers of the courts, sheriffs and members of the House of Commons. See also the Non-conformity Act, 1593, 35 Eliz. 1, c.1. By the Presentation of Benefices Act, 1605, 3 Jac. 1, c. 5, "popish recusants", convicted under one of the uniformity or supremacy acts, were denied access to the courts, id. at § 2, and "utterly disabled to exercise any public office or charge in the commonwealth." Id. at § 9.

Under Charles II, a sacramental test "according to the rites of the church of England" was imposed on all officers of municipal corporations. By The Corporations Act, 1661, 13 Car. 2, Stat. 2 c.1, §12, and by the Test Act, 1672, 25 Car.

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[5] The precise issues which divided the Court in those cases are not immediately relevant.

[6] "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history." *Id.* at 33 (dissenting opinion.)

2, c.2, all office-holders, civil and military, were required to take the sacrament and make a declaration against the Catholic doctrine of transsubstantiation. A stricter test was imposed an all members of both houses of Parliament. Act to Disable Papists from Sitting in Either House of Parliament, 1677, 30 Car. 2, st. 2, c.1. See generally Adeney, *Non-Conformity*, 9 *Encyclopedia of Religion and Ethics* 381-93 (Hastings ed. 1928); Seaton, *The Theory of Toleration Under the Later Stuarts* (1911). Annual indemnity bills and the practice of taking the sacrament once a year gave non-Catholic dissenters *de facto* immunity from these penalties. Smith, *A Constitutional and Legal History of England* 368 (1955)[7]

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[7] Between 1791 and 1868 a series of acts provided substantially full relief to Catholics and Non-conformists alike. Maitland, *The Constitutional History of England* 519-21 (1919). Though by this remedial legislation, specific sects were no longer discriminated against, the traditional oath of office was still required of various officials, 9 Encyclopedia of the Laws of England, *Oath* at 250-52 (Benton ed. 1898), and members of Parliament, Parliamentary Oaths Act, 1866, 29 & 30 Viet., c.19, as amended by the Promissory Oaths Act, 1868, 31 & 32 Viet., c.72. Accordingly, the common law rule, *Omichund* v. *Barker*, Willes 538, 125 Eng. Rep. 1310 (Ch. 1744) (under which the test of competency to testify was whether the witness believed in a God who punishes iniquity in this world or the next) excluded doubters and atheists from office. This last disability was removed by the Oaths Act, 1888, 51 & 52 Viet., c.46, which granted to non-believers the right to affirm wherever an oath is required and to omit any words of imprecation. The seating in Parliament shortly thereafter of the famous secularist Charles Bradlaugh has been called the "final important victory" for freedom of religion in England. Address by A. L. Goodhart, in *Tolerance and the Law* 14 (1955).

To this day one of the three oaths taken by the sovereign of England upon his coronation is to preserve the establishment of the Anglican Church.

The relationship between the "test oath" and the establishment in England was summarized approvingly by Blackstone:

"In order the better to secure the established church against periods from non-conformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there are, however, two bulwarks erected; called the corporation and test acts: by the former of which no person can be legally elected to any office relating to the government of any city or corporation, unless within a twelvemonth before he has received the sacrament of the Lord's supper according to the rites of the church of England; and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath of office; or, in default of either of these requisites, such election shall be void. The other, called the test act, directs all officers, civil and military, to take the oaths and make the declaration against transubstantiation in any of the king's courts at Westminster, or at the quarter sessions, within six calendar months after their admission; and also within the same time to receive the sacrament of the Lord's supper according to the usage of the church of England, in some public church, immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses, upon forfeiture of £500 and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I. c.2, which permits no person to be naturalized or restored in blood but such as undergo a like test: which test having been removed in 1753, in favor of the Jews, was the next session of parliament restored again with some precipitation." (*Commentaries,* Bk. IV, c. 4, p. 59)

With special reference to these remarks of Blackstone, Joseph Story subsequently acclaimed the Constitution's ban on religious tests:

". . . Let it be remembered, that at the very moment when the learned commentator was penning these cold remarks, the laws of England merely tolerated Protestant dissenters in their public worship upon certain conditions, at once irritating and degrading; that the Test and Corporation

Acts excluded them from public and corporate offices, both of trust and profit; that the learned commentator avows that the object of the Test and Corporation Acts was to exclude them from office, in common with Turks, Jews, heretics, papists and other sectaries; that to deny the Trinity, however conscientiously disbelieved, was a public offense, punishable by fine and imprisonment; and that, in the rear of all these disabilities and grievances, came the long list of acts against papists, by which they were reduced to a state of political and religious slavery, and cut off from some of the dearest privileges of mankind.

It was under a solemn conscieousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, that it was deemed advisable to exclude from the national government all power to act upon the subject." II *Commentaries on the Constitution of the United States*, § 1878-9 (1891, Bigelow, ed.)

Many of the American colonies had like restrictions on eligibility for public office, with variation from place to place depending on which sect was established. See Pfeffer, *Church, State and Freedom*, 68, 69, 75, 80. But in the Bill for Establishing Religious Freedom, Thomas Jefferson and James Madison sought to do away with this form of repression. The singular importance of this Bill as the precursor of the religious clause of the First Amendment was remarked by both the majority and minority in the *Everson* case, *supra*. 330 U.S. 1 at 12-14 (opinion of the Court) 35-39 (dissenting opinion). The Bill was particularly concerned with two forms of establishments: 1) taxation of citizens to support the established church and 2) disqualification for public office based on religious beliefs. The *Everson* case concerned the expenditure of public funds, and this Court addressed itself principally to those portions of the Bill dealing with the former objection (id at 13). We set forth here the relevant portions directed against disqualification. In pertinent part the preamble of the Bill read:

> "That our civil rights have no dependence on our religious opinions, any more than on our opinions in

physics or geometry; that therefore the proscribing of any citizen as unworthy of public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends only to corrupt the principle of that religion it is meant to encourage by bribing with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it."

The operative section of the Act provided that:

". . . no man . . . shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, *and that the same shall in no wise diminish, enlarge or affect their civil capacities.*" *Ibid,* (Emphasis added)

While the Bill was being pressed in Virginia (1779-86), Joseph Hawley in Massachusetts, though a member of the established Congregational church, refused to take his place in the Legislature in protest against the test oath. He wrote, "Did our Father Confessors imagine that a man who had not so much fear of God, as to restrain him from acting dishonestly and knavishly in the trust of a Senator or representative would hesitate a moment to subscribe to that declaration?". Quoted in Niles (ed.), *Principles and Acts of the Revolution,* 374.

At the Constitutional Convention, discussion of religious disqualification was in terms of the proposal that was enacted as Art. VI cl. 3, prohibiting a religious test for public office "under the United States". This proposal was presented by Charles Cotesworth Pinckney who told the convention that it was "a provision the world will expect from you in the establishment of a System founded on Republican Principles and in an age so liberal and en-

lightened as the present".[8] Although Sherman of Connecticut thought the prohibition was unnecessary since no one would seek to impose a test,[9] the proposal was adopted unanimously.[10]

The ban on religious tests won wide, although not unanimous, approval in the ratification conventions of the states. The expressions in support are further evidence of the intimate relationship between these tests and religious liberty.

Edmund Randolph, addressing the Virginia convention stated that although he had once thought that freedom of religion was endangered by the Federal Constitution, his opinion was changed by Article VI. He explained that while public officers would be required to take an oath that they would support the Constitution, yet they were not bound to support one mode of worship or to adhere to one particular sect. A man of abilities and character, of any sect whatever, could be admitted to any office or public trust under the United States. Because of the many sects that were and might be in Congress, he felt that Congress would always support religious freedom.[11]

Oliver Ellsworth, later Chief Justice of the United States, published simultaneously in the *Connecticut Courant* at Hartford and the *American Mercury* at Litchfield a series of anonymous letters on the proposed Federal Constitution, signed "A Landholder". The seventh of the series dealt with the religious test clause. He explained that its sole purpose and effect was to exclude persecution and to provide religious liberty, a right of human nature which few other people in the world shared.[12] He agreed with Randolph that a test in favor of any one denomination of

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[8] 3 Farrand, *Records of the Federal Convention of 1787*, 122.
[9] 2 *id.* 468
[10] 2 *id.* 461, 468
[11] 3 *id* 310
[12] Ford, *Essays on the Constitution of the United States*, 168

Christians would be absurd in the United States. "If it were in favor of either congregationalists, presbyterians, episcopalians, baptists, or quakers, it would incapacitate more than three-quarters of the American citizens for any public office; and thus degrade them from the rank of free men . . . " [13]

Ellsworth pointed out that if any test oath were to be imposed, the least exceptionable would be one requiring all persons appointed to office to declare, at the time of their admission, their belief in the being of a God, and in the divine authority of the Scriptures. In favor of such a test, he explained, it might be said that one who believed these great truths would not be so likely to violate his obligations to his country as one who disbelieved them. However, he rejected this argument. The making of a declaration of such a belief, he said, would be no security at all. For an unprincipled man who neither believed the word nor the being of God and was governed merely by selfish motives, would easily make a public declaration of his belief in the creed which the law prescribed, and excuse himself by calling it a mere formality.

Test oaths, he continued, would bar from public office honest men, men of principle, who would rather suffer an injury than act contrary to their consciences. It is within the authority of the people to choose their officers, he stated, and if they wished to insure that those appointed to public offices would be sincere friends of religion, they should take care to choose such persons and not rely upon "cob-web barriers as test-laws are". Connecticut, he said, had never thought it expedient to adopt a test-law and yet religion and morality was as extensive in that state as in England, where "every person who holds a public office, must either be a saint by law or a hypocrite by practice." [14]

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[13] *id.* 169-71

[14] *id.* 169-71

In Massachusetts, the Baptist Isaac Backus defended the prohibition on the ground that "nothing is more evident, both in reason and the Holy Scriptures, that that religion is ever a matter between God and the individuals." [15] Even a fellow delegate who was a minster in the established Congregational Church agreed with the ban on the ground that "God alone is the God of conscience, and, consequently, attempts to erect human tribunals for the conscience of men, are improper encroachments upon the prerogatives of God." [16]

There was considerable debate on Article VI at the North Carolina Convention. James Iredell, later a Justice of this Court, vigorously approved.

> "Yet it is notorious that dissenters qualify themselves for offices in this manner, though they never conform to the Church on any other occasion; and men of no religion at all have no scruple to make use of this qualification. It never was known that a man who had no principles of religion at all hesitated to perform any rite when it was convenient for his private interest. No test can bind such a one. I am therefore clearly of the opinion that such a discrimination would neither be effectual for its own purposes, nor, if it could, ought it by any means to be made. . . . certainly have no authority to interfere in the establishment of any religion whatsoever . . ." *But it is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?*" [17] (Emphasis added)

Governor Johnston agreed with Iredell. He granted that Jews and pagans might be elected, but deemed this an insufficient objection. " . . . if persons of such description

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[15] 2 Elliot, *Debates of the Several State Conventions on the Adoption of the Federal Constitution*. 118-19.

[16] *id.* 148-149

[17] *id.* 193-198

should, notwithstanding their religion, acquire the confidence and esteem of the people of America by their good conduct and practice of virtue" it was proper that they should be permitted to serve—though he thought it was not very probable that this would happen. Johnston thought "it would have been dangerous if Congress could intermeddle with the subject of religion."[18]

One delegate, however, contended that " . . . in a political view, these gentlemen who formed this Constitution should not have given this invitation to Jews and heathens."[19]

But another responded "/. . It is feared that persons of bad principles, deists, atheists, etc. may come into this country; and there is nothing to restrain them from being eligible to offices . . . But in this case as there is not a religious test required, it leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority; and no kind of oppression can take place." [20]

The ban on religious tests aroused opposition among some religionists. When the issue was raised in the Maryland legislature, Luther Martin related:

"The part of the system which provides that no religious test shall ever be required as a qualification to any office or public trust under the United States was adopted by a great majority of the Convention and without much debate: however, there were some members so unfashionable as to think that a belief in the existence of a Deity, and of a state of future rewards and punishments would be some security for the good conduct of our rulers, and that, in a Christian Country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism".[21]

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[18] 4 *id.* 198-9
[19] 4 *id.* 199
[20] 4 *id.* 200.

The late Canon Stokes, in *Church and State in the United States* (Vol. I, p. 602-603), summarizes the arguments presented in the States legislatures and ratifying conventions for and against the ban on religious tests for office in Article VI.

"The first group felt that history showed the grave danger of religious tests leading to persecution; that the Federal government should have no right to interfere with the states in this matter; that Christ never called for support for His religion by worldly authority; that the people of this country might be relied upon not to entrust government to irreligious people; that the only way to produce national political unity was to leave religion "free and unshackled"; that permitting a variety of sects encouraged religious freedom and prevented any State Church; that to require a religious test would exclude some well-qualified citizens from holding office; that likewise such a test would not prevent some unscrupulous men entering public life; that St. Peter's statement that "God is no respecter of persons" is applicable in this case; that religion is exclusively a matter between God and the individual and not subject in any way to State approval; that the high state of intelligence and liberty in the country made further guarantees of religious liberty unnecessary, especially as the Constitution gave no power to Congress to intervene in religious matters.

"The second group was represented by those who feared that they might be deprived under the Constitution of the privilege of worshipping God according to their consciences; that the treaty-making power of the Senate might result in a treaty or treaties making the Roman Catholic religion compulsory; that the pope might be elected president; that unbelievers or Mohammedans might be officeholding; that "Popish priests" might not be excluded from elected to office; that the oath of office might be sworn merely by Jupiter or by Minerva; that as the Constitution did not guarantee that officeholders be men believing in God or in Christ, it was dangerous."

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[21] 3 Farrand, *Records of the Federal Convention of 1787*, 227.

This account of the background that gave rise to the ban in the Federal Constitution on religious tests for office establishes conclusively, first, that its scope includes tests based upon a belief in the existence of God (so that Roy Torcaso, the Appellant herein, is qualified to serve as President of the United States although the court below held him unqualified to serve as a notary public in Montgomery County), and secondly, that the ban was imposed in order to assure the separation of church and state and to abolish all vestiges of an establishment of religion.

Since the prohibition against the establishment of religion is now applicable to the States by virtue of the Fourteenth Amendment, we submit that so too is the prohibition of religious tests for public office, which is an unseverable element in the prohibition against establishment of religion.

B. Preference of Some Religions over Others

The requirement of a belief in the existence of God prefers some religions over others, specifically theistic religions over those which are non-theistic.

It is frequently assumed that all religions are founded upon a belief in the existence of a personal God or at least of some "God" no matter how that term is defined. This is not so. So great a religion as the Buddhist religion with over 150 million adherents throughout the world including the United States (*World Almanac*, 1961, p. 712) is not founded upon a belief in the existence of God. Rhys-Davis, "Buddhism," in *Religious Systems of the World*, p. 142; Spielberg, *Living Religions of the World*, p. 247; Alabaster, *The Wheel of the Law*, p. XXXVII.

In *Washington Ethical Culture Society* v. *District of Columbia*, 249 F. 2d 127, the Court of Appeals for the District of Columbia held unanimously that the Ethical Culture Society is a religious society and that Ethical Culture is a religion although it does not require "a belief and teaching

of a Supreme Being who controls the universe." See also, *Fellowship of Humanity* v. *Alameda County*, 153 C.A. 2nd 673, 315 P. 2nd 394.

It is clear, therefore, that in fact and in law belief in the existence of God is not an indispensable element of religion and that the validity of a religion does not in law depend upon its commitment to a Supreme Being. It follows from this that a law favoring theistic over non-theistic religions constitutes preferential treatment forbidden by the prohibition of laws respecting an establishment of religion. Such a law is no less barred by the First Amendment than one requiring a belief in Christianity, or in Trinitarian Christianity, or in Protestant Christianity.

C. Neutrality Between Belief and Non-Belief

The obligations of the First Amendment are not satisfied by according governmental favors to all religions equally. The limitations of the Amendment are transgressed when the States singles out religious groups for preferential treatment over comparable non-religious groups. *Everson* case, *supra*.

Hence, even if religion were narrowly defined to exclude non-theistic belief, a law according special privileges to theism would violate the mandate of neutrality. In the *Washington Ethical Culture* case, *supra*, the Court of Appeals referred to the potential invalidity of such preferential treatment. It construed the underlying statute so as to avoid the constitutional issue but noted that exclusion of non-theism from benefits and privileges accorded by the State to theism would raise serious constitutional problems. In the present case, the constitutional issue is raised since the Maryland Court of Appeals has held that the action of the Clerk of the Circuit Court for Montgomery County acted within his authority under the Constitution of the State of Maryland.

III

THE MARYLAND TEST OATH IS A RELIGIOUS TEST PROHIBITED BY ARTICLE VI, UNITED STATES CONSTITUTION.

Article VI, United States Constitution presents another prohibition against the requirement that one seeking a public office must, as a qualification for that office, declare his belief in the existence of a Supreme Being. The third clause of Article VI of the United States Constitution reads as follows:

"The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but *no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.*" (Emphasis supplied.)

This language is absolute and unqualified in its terms. It flatly prohibits *any* religious test as a qualification for any public office, necessarily including a statement of belief in the existence of God. It is clear that the office of Notary Public in the State of Maryland falls within this prohibition, as it is an "Office or public Trust" and is so recognized by the Court below. (R. 13). That Court, however, found the third clause of Article VI is "plainly inapplicable". (R. 17) We submit that this conclusion erroneously limits the scope of the provision.

In view of the sweeping language of the abolition of religious tests in Article VI, the sole question is whether language of the above-quoted clause, particularly "under the United States" includes state, as well as federal, offices. The issue is admittedly not free from doubt, and there is no case law in point. The context of the clause strongly suggests that state officers were intended to fall within the scope of the prohibition. All state officers were bound to take an oath to defend the United States Constitution. Thus they were to serve literally "under the United States".

The very purpose of Article VI as a whole was to declare that state power was limited by the Federal Constitution and the Laws enacted pursuant thereto, which were to be the Law of the Land. Article VI, after all, contains the Supremacy Clause. *Cf. Cooper* v. *Aaron*, 358 U.S. 1. The entire scope and intent of the Supremacy Clause was to answer such claims as that advanced by the Court below that "Obviously, Congress could not prescribe qualifications for state office, at least not so long as we retain a Federal form of Government". (R. 17) Indeed, the sentence immediately preceding the prohibition of religious tests prescribed precisely such a qualification for state office—an oath or affirmation to support the Constitution. Moreover, it is obvious that the power of *Congress* to so act is in no way relevant here and that the *Constitution* could and did impose countless limitations, expressed and implied, upon the states. Article I, Section 10, alone, places over a dozen such limitations upon the several states, and further restrictions are found in Articles III and IV.

It appears strange, indeed, to impute to the authors of the Constitution an intent to prescribe an oath *or* affirmation for federal and state officers alike, but to forbid a religious test only for federal officers. Moreover, if they had intended that only federal officers would be relieved of religious tests, this clause presumably would have been placed in one of the Articles dealing with the various offices created by the Constitution, or as one of the limitations on Congressional legislative power in Article I, rather than in Article VI, dealing with the relationship between the federal government and the states.[22]

While it is true that Appellant's position in this regard has been rejected by some scholars in this field,[23] it must

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[22] Stokes, *Church and State in the United States*, N.Y., Harper and Brothers, 1950, Vol. I, Sections 523-24, 576, 611-12; Zollman, *Religious Liberty in the American Law*, 17 Mich. L. Rev. 355-56, (1919). See also Story, *op. cit. 25 supra*.

be noted that they, like this Court, were faced with a question on which there appears to be no direct expression of the drafters' intent and therefore they could but speculate. In addition, there is no indication that either considered the very placement of the prohibition, as discussed above, as an implicit expression of that intent. Indeed, their conclusion is entirely unsupported by analysis. Even if this Court rejects the view that the framers of the Constitution intended to include state offices with the prohibition of Article VI, it is submitted that the subsequent passage of the First and Fourteenth Amendments and the decisions of this Court interpreting them demonstrate beyond peradventure that state offices are included today. And here, Canon Stokes supports our position:

"There are two fundamentally important provisions which deal directly with religious rights, namely, the forbidding of religious tests as qualifications for public office in the original Constitution, and the guarantee of religious free-

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[23] The Convention proceedings shed little light on this question. As noted earlier in the text, the prohibition against religious tests was adopted with only minor opposition—and that based on the view that it was unnecessary.

Pinckney simultaneously introduced the amendment which authorized the pledge to support the Constitution, which state officials also had to take, to be by affirmation. 2 Farrand *op cit, supra.* Moreover, the religious test provision was throughout the Convention dealt with as part of Article VI, rather than with the Articles which dealt exclusively with federal officers.

The post-Convention history is likewise unconclusive. In a letter to Randolph, Madison is surprisingly lukewarm about the ban on religious tests and tries to dismiss it as "insignificant". In this letter he states expressly that the provision applies solely to federal offices 3 *id* at p. 297. But Randolph, himself, took a much stronger view and one of his remarks may mean that the prohibition was to be universal. 3 *id* at p. 310.

dom in the Bill of Rights, which followed two years later. The provisions of the later Fourteenth Amendment, as ratified in 1868, indirectly greatly expand the scope and field of operation of the constitutional guarantees." [24]

Later in his treatise, he noted that, "as a matter of fact it (the original Constitution) was and is important in preventing religious tests for Federal office—a provision later extended to the states." Id. at Section 527. Further:

". . . little by little these guarantees (under Article VI and the Bill of Rights), originally intended to cover only Federal cases, (were) extended to include the whole nation." Id. at Section 611.

Therefore, the intention of the drafters may have been a narrow one—to prohibit only the most flagrant form of interference with religious freedom, namely, the test oath. Later, with passage of the First Amendment, they gave to freedom of religion its present, virtually all-encompassing protection. It defies common sense as well as constitutional doctrine to contend that, although the protections to religious freedom embodied in the First Amendment were later extended to the states by the Fourteenth, that latter Amendment did not equally expand the protection to religious liberty considered by the framers as so fundamental that it warranted inclusion in the original Constitution, namely, a prohibition of the test oath. Thus, even under this alternative view, that the protection of religious freedom was expanded in broadening stages, the Article VI ban against religious tests for public office, considered so odious by the framers, is now clearly included in the guarantee of freedom of religion contained in the contemporaneous First Amendment and extended to the states by the Fourteenth.

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[24] Stokes, *Church and State in the United States*, N.Y., Harper and Brothers, 1950, Vol. I, Section 522.

IV

DISQUALIFICATION OF AN OTHERWISE QUALIFIED APPLICANT FOR STATE OFFICE SOLELY FOR REFUSAL TO DECLARE A BELIEF IN THE EXISTENCE OF GOD DENIES HIM DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. "Right" or "Privilege"

The Circuit Court for Montgomery County emphasized that Appellant ". . . can continue his religious position without any interference from Maryland, either as to his present employment or his citizenship, as neither is being interfered with." (R. 10.) However, it denied Appellant relief, on the asserted ground that appointment to the office of Notary Public is a "privilege". (R. 9.)

The Maryland Court of Appeals likewise held that the Appellant is ". . . not compelled to believe or disbelieve . . ." (R. 17) and denied relief on similar grounds. Although it did not employ the term "privilege", it expressed the same thought when it stated that Appellant ". . . is not compelled to hold office." (R. 17.)

The courts below imply that the qualifications which may be imposed for a state office depend upon whether it is labeled a "Right" or "Privilege". Such is not the case. Equal protection of the laws bars a state from granting privileges to some while it withholds them from others, unless a constitutionally reasonable and nondiscriminatory distinction can be made between those favored and those not favored.

The claim that public employment or office is a privilege within the uncontrolled power of the state to grant or withhold was asserted in *Wieman* v. *Updegraff*, 344 U.S. 183, and rejected by a unanimous Court. In its opinion this Court stated:

> ". . . To draw . . . the facile generalization that there is no constitutionally protected right to public employ-

ment is to obscure the issue. For, in *United Public Workers,* though we held that the Federal Government through the Hatch Act, 18 U.S.C.A. § § 118j, 118l, could properly bar its employees from certain types of political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass, or take any active part in missionary work. . . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory.'" Id. at 191.

In *Speiser* v. *Randell,* 357 U.S. 513, 518, concerning denial of a tax exemption, concededly a privilege, the Court held:

"To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech. This contention did not prevail before the California courts, which recognized that conditions imposed upon the granting of privileges or gratuities must be 'reasonable'."

Thus, in the granting or withholding of benefits, the label does not determine the state's power to impose conditions and qualifications. Whether the office be classified as one of "right" or "privilege", the qualifications must be reasonable, nondiscriminatory and within the Constitutional competence of the State.

B. The Reasonableness of the Discrimination

"In the absence of any direct authority on the point, we find it difficult to believe that the Supreme Court will hold that a declaration of belief in the existence of God, required by Article 37 of our Declaration of Rights as a qualification for State office, is discriminatory and

invalid." *Torcaso* v. *Watkins*, Maryland Court of Appeals Decision (R. 18).

The Court below asserts that the "... Fourteenth Amendment does not prevent the states from establishing qualifications for office, at least where the qualifications are not based on such an unreasonable and improper classification as to be discriminatory." (R. 17). Armed with that premise, the Court below attempts to predict this Court's decision in the instant case.

We contend, however, that the Maryland Court of Appeals ignored the more serious and controlling premise; that the qualification in question is far from reasonable or proper, and is highly discriminatory. The furtherance of a religious purpose is not within the Constitutional competence of a state. Jefferson's Virginia Statute points out that religion is corrupted, not aided, "... by bribing with a monopoly of worldly honors and emoluments those who will externally profess and conform to it." Page 25-26 *Supra*.

We have established above that the First Amendment guarantees freedom to disbelieve as completely as it does freedom to believe, and consequently "encompasses the ungodly". By their affirmance of Appellant's right to disbelieve without interference from the State of Maryland, both courts below recognized the proper concept of freedom of choice between religion and nonreligion. It is difficult to comprehend in what manner it can be reasonable, nonarbitrary, or nondiscriminatory to bar an otherwise qualified individual from public office merely because he has exercised a Constitutionally guaranteed choice between religious belief or nonbelief, which choice is apparently recognized by the very courts below which upheld the "test oath" requirement.

A state's duty is to remain completely neutral with respect to all matters of religion. Were a case brought before the Court below to test a state provision against Methodists, otherwise qualified, from acting as clerks of the courts, or

providing that no Jew, otherwise qualified, could be a member of the Maryland Legislature (or any other incapacitation for any position of trust or profit based on religious affiliation or lack of same) it is felt that such "test oath" legislation would be stricken as highly discriminatory, as well it should. That which would render this hypothetical legislation arbitrary and unreasonable, the freedom of religion concept of the First and Fourteenth Amendments, similarly bans the operation of the present Article 37. The same constitutional protections which allow freedom to embrace the Methodist Religion or follow the Jewish faith, allow Appellant to follow nontheistic beliefs. To disqualify Appellant from public office in a state, based solely on his lack of theistic religion, is to sanction disqualification from state office of followers of any specific theistic religion. To state that Appellant does not believe in a "God", whereas followers of theistic religions do, is not sufficient, for there is no meaningful guarantee under the First Amendment of freedom of exercising religion if it be only a theistic religion.

In *West Virginia Board of Education* v. *Barnette, supra,* Mr. Justice Jackson stated that only a grave, clear and present danger could warrant the state forcing an individual to utter words which violate his religious conscience.[25] That case is clear authority for the proposition that a state may not impose upon an individual the obligation to profess any religious view. In the instant case, as in that, the State asserts power to condition an important benefit "on making a prescribed sign and profession". 319 U.S. at 630. Here, however, the particular form of interference with Appellant's religious freedom is doubly offen-

[25] As this Court said in *Speiser* v. *Randall, supra* "only considerations of the greatest urgency can justify restrictions on speech . . ." 357 U.S. at 521. It goes without saying that a test at least equally as stringent is to be applied where the attempted restriction is on religious belief.

sive, as he is required to swear his belief in the existence of a God regardless of whether he holds such a belief. To sustain this requirement, this Court, as in the *Barnette* case, will be "required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind". Id. at 633-34. "The test oath is abhorrent to our traditions, *Girouard* v. *United States*, 328 U.S. 61, 69.

The oath sought to be imposed upon Appellant thus infringes upon both the private area of his beliefs in general and his religious scruples in particular. As stated by Mr. Chief Justice Hughes, dissenting from the holding of validity of a Congressionally-imposed naturalization oath for aliens:

> "To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of Congress but as repugnant to the fundamental principles of representative government." *United States* v. *Macintosh*, 283 U.S. 605, 632.

Mr. Justice Douglas, in his concurring opinion in *Speiser* v. *Randall, supra,* faced squarely the question of invasion of one's beliefs in connection with the holding of public office:

> "Today what one thinks or believes, what one utters and says have the full protection of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed "invert the order of things", to use Hamilton's phrase. All public officials—state and federal—must take an oath to support the Constitution by the express command of Article VI of the Constitution. . . . But otherwise the domains of conscience and belief have been set aside and protected from government

intrusion. . . . What a man thinks is of no concern to government." 357 U.S. at 535-36.

Qualification for office based on belief in a theistic or nontheistic religion cannot be deemed reasonable, proper or nondiscriminatory.

C. Position of Notary Public

The Maryland Court of Appeals appears to attach great importance to the fact that the position which the Appellant seeks is that of Notary Public. "It would appear to be somewhat paradoxical," the Court said, "if a Notary Public, who is given the power to administer oaths . . . might qualify for the office even if he disavowed a belief in God . . ." (R. 19).

But a Notary Public is not the only person authorized to administer oaths. Judges in all courts, commissioners, court clerks, mayors, members of legislative committees, and a host of other public officials throughout the United States are authorized by law to administer oaths. If a religious test oath may reasonably be imposed as requirement for the office of Notary Public, there are not many public offices for which it might not be imposed.

However, the short answer to the contention that the State's interest in preventing perjury justifies imposition of a religious test for public officers authorized to administer oaths is to be found in the fact that neither the United States Government nor at least 46 of the States [28] impose such a test. Officials of these governments administer millions of oaths yearly; yet there is not the slightest evidence in the record or elsewhere to indicate that perjury is more widespread among these governments than in the four states which do impose such a test oath.

The Court below deemed Article 36, Maryland Declara-

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[28] Besides Maryland, the Constitutions of Arkansas (Art. 19, sec. 1), Pennsylvania (Art. 1, sec. 4) and Tennessee (Art. IX, sec. 2) presently require acknowledgment of the "being of God" in order to hold public office.

tion of Rights of significant importance to a determination of the issues herein. Article 36 provides as follows:

"That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law to be molested in his person or estate, on account of his religious persuasion or profession, or for his religious practice, unless, under the color of his religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain any place of worship or any ministry; nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor in this world or the world to come."

Referring to the just-quoted Article, the Court below advises that "It might well be contended that a person convicted upon unsworn testimony, or the testimony of an atheist, would be deprived of due process, or trial according to the 'law of the land'. . . . To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissable differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror." (R 18-19). But the rule by which Maryland seeks to justify its discrimination is itself unconstitutional as we now show.

"The true purpose of the oath is not to exclude any competent witness, but merely to add a stimulus to truthfulness wherever such stimulus is feasible. Until the 1800s,

however, this advanced notion of its purpose had not been reached. The requirement was inexorable; with the result that three classes of persons were absolutely excluded from testifying, Namely adults having an atheistical belief, infants lacking in theological belief and adults having the requisite belief but forbidden by conscience to take an oath. It came gradually to be perceived that the use of the oath, not to increase testimonial efficiency, but to exclude qualified witnesses was not only an abuse of true principle, but also a practical injustice to suitors who needed such testimony. This injustice is clearly enough seen today; but its perception was naturally slow in coming, so long as in the community at large the profession of belief in deism or atheism was associated closely with the notion of moral defects. . . . Today, practically everywhere, the injustice is remedied. Arguments are no longer needed to prove the impropriety of the old inexorable rule. It is conceded that the oath should be dispensed with for appropriate classes of witnesses. . . . What is to be noted (but is sometimes forgotten) is that the demand for the dispensation of the oath for witnesses for whom it is inappropriate differs entirely from the proposal to abolish the oath for persons theologically capable of taking it. One is a question for the past; the other is a question for the future." *VI Wigmore, Evidence,* Section 1827 (3d Ed. 1940).

Wigmore, in tracing the history of the oath, noted that the recognition "that the inexorable requirement of an oath worked in injustice, and that theological belief should not obstruct the admission of competent witnesses" began as early as the 1700's. Id. at Section 1815. He noted further that the nature of the belief which was to afford the stimulus to truthful testimony is that in a superhuman moral retribution which will follow false swearing. It is thus a belief in a system of future rewards and punishments. Id. at Section 1817. But, would not such a belief exclude from public office and the witness stand members of those religions whose precepts do not include belief in a system of rewards and punishments? It is into this maze of constitutional questions we are led by the retention of the inflexible common law rule, devised centuries before our Bill of Rights. Thus,

". . . the question is not whether persons not having a certain theological belief shall be excluded as witnesses; nor whether it shall be made optional for persons of various sorts; but whether persons having the sufficient belief shall be required to take it. *Eliminating all argument as to the injustice of exclusion, by assuming that persons of atheistic belief, and persons having scruples of conscience, and infants, are allowed to dispense with it. . . .*" Id. at Section 1827. Emphasis added.

It certainly cannot be said that atheists as a group are not worthy of belief. Appellant has demonstrated his veracity by his refusal to take the oath acknowledging a belief in God. If he had done so, he would have received his commission automatically and would not have risked losing the office or been required to bear the expense of the ensuing litigation. The example of the right of Quakers to affirm, rather than swear, is very much in point here. That right was won at the cost of persecution, ridicule and humiliation. Gradually, however, Englishmen and Americans alike recognized that even though Quakers would not swear, they could be counted on to tell the truth. Their very willingness to endure the persecution for the right to affirm was evidence that they did not take affirmations lightly.

The same rationale applies to atheists. As Thomas Raeburn White stated in a law review article early in this century:

"It requires more than usual frankness and regard for the truth to avow such sentiments (i.e., of nonbelief) upon such an occasion. If he does avow them, the consequences are severe. He subjects himself to certain criticism, if not to infamy, as was once thought; he makes it impossible for himself to be a witness in a case in which perhaps he desires to testify, for possibly he be an expert who depends upon his right to testify for a living. The presumption, therefore, of mendacity is not only completely destroyed, but it is supplanted by another, the strongest kind of presumption, that the witness will adhere strictly to the truth. He may indeed be lacking in religious sanction, but he has shown that the other inducements to truth telling are present in him to an extraordinary degree. How palpably inconsistent

to exclude such a man and to admit an abandoned criminal who declares whether true or false that he believes in God." *Oaths in Judicial Proceedings and Their Effect Upon the Competency of Witnesses,* 42 N.S. Am. Law Reg. 373, 409 (1903).[27]

In *Gillars* v. *United States,* 182 F. 2d 962, 970 (D.C. Cir.), Circuit Judge Fahy held that "in the light of reason and experience" (which is the test of competency under Rule 26 of the Federal Rules of Criminal Procedure) a witness should be permitted to affirm, rather than swear. *Gillars* was a treason trial. Surely if a witness is competent to testify under affirmation in a treason case, he should be competent to attest the authenticity of a document in the same manner.

The disqualification of Appellant from holding public office and from being a witness serves to impose upon him the stigma of second-class citizenship. For example, aliens were not permitted to testify under the common law. II Wigmore, *Evidence,* Section 516 (3d Ed. 1940). Moreover, it is unthinkable as a matter of due process that a person on trial for his life or liberty should be denied the testimony of a key witness solely because the latter may be an atheist. And what if the atheist, himself, is on trial? May he be deprived of the opportunity of testifying on his own behalf?

In *Hirabayashi* v. *United States,* 320 U.S. 81, this Court said (at p. 100): "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." The same is true, we submit, in respect to distinctions based upon religious belief. Only upon the most cogent evidence of the necessity for a distinction on religious grounds would governmental discrimination be constitutionally justifiable. What we have in the present

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[27] See also Bentham, *Swear not at all,* in V *Jeremy Bentham's Works* (Bowring Ed. 1843), p. 187.

case is no more than mere speculation, contradicted by the century and three quarters experience of the Federal Government and the many years of experience of forty-six state governments. Such speculation does not justify disregard of the Constitutional mandate of equality.

The fact that Maryland is all but alone in retaining this relic of the common law suggests that it does not comport with the requirements of due process. For, unlike the "contrariety of views of the States" noted by this Court in *Wolf* v. *Colorado*, 338 U.S. 25, 29, there is virtual unanimity of state rejection of the religious oath in judicial proceedings. See, *Rochin* v. *California*, 342 U.S. 165, 169-71, and the concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 162-63.

For all of these reasons, a qualification for public office based on belief in a theistic or nontheistic religion cannot be deemed reasonable, proper or nondiscriminatory, nor does embracing nontheistic religious belief create any grave, clear or present danger. The true danger is in sanctioning a compulsory rite which violates the conscience of the individual.

CONCLUSION

Freedom of belief "is the matrix, the indispensable condition of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from the encroachment of the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action." Palko v. Connecticut, 302 U.S. 319, 327. The decision of the Court below strikes directly at liberty of the mind. It should be reversed, and the cause remanded with directions to overrule the demurrer.

Respectfully submitted,

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